Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or

(2) unlawfully retaliate against persons.

(b) In relation to a law firm's operations, a lawyer shall not:

(1) on the basis of any protected characteristic,

(i) unlawfully discriminate or knowingly* permit unlawful discrimination;

(ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or

(iii) unlawfully refuse to hire or employ a person,* or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or

(2) unlawfully retaliate against persons.

(c) For purposes of this rule:

(1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

(2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and

(4) "retaliate" means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this Rule.

(d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

(e) Upon being issued a notice of a disciplinary charge under this Rule, a lawyer shall:

(1) if the notice is of a disciplinary charge under paragraph (a) of this Rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or

(2) if the notice is of a disciplinary charge under paragraph (b) of this Rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.

(f) This Rule shall not preclude a lawyer from:

(1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;

(2) declining or withdrawing from a representation as required or permitted by Rule 1.16; or

(3) providing advice and engaging in advocacy as otherwise required or permitted by these Rules and the State Bar Act.

Comment

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). In relation to a law firm's operations, this Rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisorial lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.") A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] A lawyer does not violate this Rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this Rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law.

[4] This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

[5] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisorial lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this Rule.

[6] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this Rule should be abated.

[7] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[8] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this Rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code §§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT1] Synopsis of Public Comments

TOTAL = 3 *A = 2* *D = 0* *M = 1* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-25d	Bar Association of San Francisco (Banola) (01-13-17)	Yes	A		Our Committee supports the most recent revisions to Proposed Rule 8.4.1 as written. The revisions are consistent with the meaning and purpose of the previously proposed ALT 1 version of this rule, eliminating the pre-condition, pre-litigation requirement found in current Rule 2-400(C) and the proposed ALT 2 version, for which this Committee expressed support in its September 2016 comments.	No response required.
Y-2016-6e	Los Angeles County Bar Association (Schmid) (12-14-16)	Yes	A		We support revised Proposed Rule 8.4.1, which incorporates the Commission's ALT1 version of the Rule. We continue our support for the elimination of subpart (C) of current Rule 2-400, which requires that a non-disciplinary tribunal must have first fully adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred before a disciplinary investigation or proceeding may be initiated. We also fully approve the revised language that clarifies the applicability of the rule to retaliatory behavior and reinforces the scope of the Rule being limited to unlawful discrimination and harassment.	No response required.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					Current Rule 2-400 has been in effect since 1994. It represents the Supreme Court's policy that discrimination and harassment by lawyers conducted in the course of representing clients or in operating a law firm constitute ethical misconduct that is subject to discipline. The prior adjudication requirement contained in current Rule 2-400 would so delay disciplinary proceedings as to threaten the availability of witnesses and documentary evidence, so that the current rule is virtually unenforceable. As a result, the Supreme Court's public policy objectives are frustrated. The Proposed Rule would cure that defect. Proposed Rule 8.4.1 poses no risk that lawyers would be prosecuted on the basis of meritless claims of discrimination or harassment. The Proposed Rule expressly requires that, in order to be subject a lawyer to discipline, the alleged misconduct must be unlawful, as determined by reference to applicable state and federal statutes and decisions in employment and in offering good and services to the	

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					public. In disciplinary proceedings, the state bar would have the burden of establishing unlawfulness of the conduct as part of its case in chief. In addition, in all proceedings before the State Bar Court the state bar must meet a clear and convincing burden of proof. Protection of the public mandates the adoption of Proposed Rule 8.4.1. Discrimination and harassment frequently occur as a continuing course of conduct which requires intervention. Current Rule 2-400 prevents the state bar from taking action which would interrupt ongoing lawful behavior. Again, Proposed Rule 8.4.1 would cure that defect.	
Y-2016-21af	Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	M		1. OCTC supports subsections (a) and (d) of this rule. 2. OCTC supports the general concepts in subsections (b) and (c), but is concerned that subsections (b)(1) and (2) and (c)(2) require "knowingly" for the same reasons expressed regarding that term in proposed rules 1.9 and 3.3 of this letter and the General Comments section of OCTC's September 27, 2106 letter. The rules should not encourage willful blindness, gross	1. No response required. 2. The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in (b) and (c).

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					negligence, recklessness, or a failure to investigate. 3. OCTC supports Comments [2], [7], [8], and [9]. 4. Comments [1] and [5] are more appropriate for treatises, law review articles, and ethics opinions. They are merely a philosophical discussion of the reasons for the rule. Further, OCTC is concerned with the use of the term "knowingly" in Comment [5] for the same reasons expressed regarding that term in proposed rules 1.9 and 3.3. 5. Comments [3] and [6] are unnecessary.	3. No response required. 4. Comment [1] explains the application of the rule in relation to rule 8.4(a) and the supervision rules. Rule 8.4 and the supervision rules are new rules and the discrimination rule should facilitate compliance with these related rules. Regarding "knowingly" see the response above to point #2. 5. Both comments provide appropriate information. Comment [3] describes the application rule 8.4.1 in limited scope representations. Comment [6] explains paragraph (d) and highlights that the rule would be subject to the usual State Bar Court abatement policies.